IN THE

Supreme Court

OF THE

United States

October Term, 1941

No. 1167

ROBERT MOODY, AUGUST J. LANG, Jr.,
and R. F. McMULLEN,
Petitioners,

vs.

TOOLE COUNTY IRRIGATION DISTRICT,
Respondent.

Respondent's Brief

In Opposition to Petition for Certiorari

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WILLIAMS PRINTING COMPANY, SHELBY

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INTRODUCTION

The questions involved in this proceeding will be discussed in this brief in the same order that they are stated in the Petition for Writ of Certiorari. (Petition pages 2 and 3).

I.

The later decisions of the Supreme Court of Montana changing the previous interpretation of the statute under which the bonds involved herein were issued, does not impair "the obligation of contracts" within the prohibition of the Tenth Section of Article I of the Federal Constitution.

Section 10 of Article I of the Federal Constitution is directed only against the impairment of contracts by legislation. This point is definitely settled by numerous decisions of this Court. In Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382 Mr. Chief Justice Taft, speaking for the Court, said:

> "It has been settled by a long line of decisions that the provisions of Sec. 10, Article I of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation, and not by judgments of courts. The language—'No state shall * * * pass any * * * law impairing the obligation of contracts' — plainly requires such a conclusion."

The same rule was declared in the more recent case of Stockholders of Peoples Bank v. Sterling, 300 U. S. 175, 57 S. Ct. 386. In that case Mr. Justice Cardoza said:

> "Change by judicial construction of certain legislation does not impair a contract, at least in the forbidden sense, if it be granted arguendo that such a change can be discovered."

There are numerous earlier decisions to the same effect.

Mississippi & M. R. R. Co. vs. Rock, 4 Wallace (U. S.) 177, 18 L. Ed. 381.

Knox vs. Exchange Bank, 12 Wallace (U. S.) 379, 20 L. Ed. 414.

Mississippi & M. R. R. Co. vs. McClure, 10 Wallace (U. S.) 511, 19 L. Ed. 997.

National Mutual Building and Loan Association vs. Braham, 193 U. S. 635, 48 L. Ed. 823.

Roth vs. Oregon, 227 U. S. 150, 57 L. Ed. 458.

Columbia R. Gas & E. Co., vs. South Carolina, 261 U. S. 236, 67 L. Ed. 629.

McCoy vs. Union Elevated R. R. Co. 247 U. S. 354, 62 L. Ed. 1156.

The decision of this Court in Erie Railroad Company vs. Tompkins, 304 U. S. 64 and subsequent decisions to the same effect, cannot be deemed to overrule the decisions above cited, or to enlarge or extend the scope of the prohibition contained in Section 10, Article I of the Constitution.

It should also be noted that the bonds involved in this case were issued prior to the date of any State Court or Federal Court decisions interpreting the Statute under which the bonds were issued. The case does not therefore fall within the rule declared in Gelpcke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520, even if that case still be regarded as sound authority.

The bonds involved in Gelpcke v. Dubuque, supra, were issued subsequent to the State Court decisions upholding the validity of the State Statute and interpreting the same.

And it was this fact that constituted the basis of the decision in that case.

Gelpcke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520 at 525.

The same is true of the following cases:

Anderson vs. Santa Ana Township, 116 U. S. 356, 29 L. Ed. 633.

Douglass vs. County of Pike, 101 U. S. 677, 25 L. Ed. 968.

These decisions were all rested upon the ground that the liability of the Municipal Corporation issuing the bonds and the rghts of the parties purchasing the bonds should be determined according to the law as declared by the State Courts at the time the securities were issued. These decisions are not in point upon the question involved in this case, even if they could still be regarded as sound authority.

II.

The decision of this Court in the Tompkins case and subsequent cases require the Federal Courts to follow and apply the latest decisions of the Supreme Court of Montana in the interpretation of the state statute.

In the decision which Petitioners seek to have reviewed, the Circuit Court of Appeals followed the latest decisions of the Supreme Court of Montana in its interpretation of the State Statute under which the bonds were issued.

Toole County Irrigation District v. Moody, 125 Fed.

(2d) 498, (R. 120 to 128).

The latest decisions of the Supreme Court of Montana are to the effect that the bonds upon which the suit was brought, do not constitute an obligation of the Irrigation District and the District acts only as an agency through which assessments are levied and collected.

State ex rel Malott v. Board of County Commissioners of Cascade County, 89 Mont. 37, 296 Pac. 1.

Rosebud Land & Improvement Co. v. Carterville Irrigation Co., 102 Mont. 465, 58 Pac. (2d) 765.

In State ex rel Malott v. Board of County Commissioners of Cascade County, 296 Pac. 1, 89 Mont. 37 the Court said:

> "The bonds are not an obligation of the district at all, but rather a charge against the lands within the district. The lien applies to the lands within the district. The district, in its capacity as a public corporation, merely acts as the agency through which the assessments are levied and collected."
>
> * * * * * *
>
> "We are satisfied that the rule heretofore announced by this court to the effect that bonds issued by an irrigation district constitute general obligations of that district is erroneous."

State ex rel Malott v. Board of Commissioners of Cascade County, 89 Mont. 37, at 94-95, 296 Pac. 1, at 18-19.

The same view was reasserted in the subsequent case above cited.

Rosebud Land & Improvement Co. v. Carterville Irrigation District, 102 Mont. 465, 58 Pac. (2d) 765.

The Circuit Court of Appeals was obliged to follow these decisions and it properly held. (R. 125).

Vandenbork v. Owens Illinois Glass Co., 311 U. S. 538, 61 S. Ct. 347.

Leffingwell v. Warren, 2 Black. 599, 17 L. Ed. 261.

Stoner vs. New York Life Insurance Co., 311 U. S. 464.

Moore vs. Illinois Central R. R. Co., 312 U. S. 631, 61 S. Ct. 754.

III.

Since the rights of the bondholders and the liability of the Irrigation District have been definitely defined by State Court decisions, the Federal Courts have no right or authority to exercise an "independent judgment" in the interpretation of the statute.

The former rule that Federal Courts had a right to exercise an "independent judgment" as to the meaning of a State statute where contractual rights arose thereunder prior to the interpretation by the State Court, came to an end with the decision of this Court in Erie Railroad Co., v. Tompkins, 304 U. S. 64. The scope and effect of that decision is declared in the opinion of Mr. Justice Brandeis in the following language:

> "that the purpose of section (Sec. 34 of the Federal Judiciary Act of September 24, 1789. 28 U. S. C. A. Sec. 725), was merely to make certain that, **in all matters except those in which some federal law is controlling,**

the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written. (58 S. Ct., at 819)."

* * * * * *

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Erie Railroad Co. v. Tompkins, 304 U. S. 64.

The principle of Erie Railroad Co. v. Tompkins is thus made applicable to all cases in the Federal Court "except those in which some Federal law is controlling." All of the subsequent decisions of this Court have definitely denied to Federal Courts any right to exercise an "independent judgment" in the interpretation of State statutes in cases where the State statute has been interpreted by the State Supreme Court.

Stoner v. New York Life Insurance Co., 311 U. S. 464, 61 S. Ct. 336.

Vandebork vs. Owens Illinois Glass Co., 311 U. S. 538, 61 S. Ct. 347.

Moore v. Illinois Central R. Co., 312 U. S. 631, 61 S. Ct. 754.

The earlier decisions of this Court in Gelpcke v. Dubuque, 1 Wall. 175; Douglass v. County of Pike, 101 U. S. 677; Kuhn v. Fairmont Coal Co., 215 U. S. 349; Rowen v.

Runnals, 5 Howard, 134, cannot be reconciled with these later decisions and must be deemed overruled.

Whether or not the earlier decisions of the Supreme Court of Montana interpreting the irrigation statutes established a rule of property which should not be disturbed by subsequent decisions was a question of Montana law. The question was considered and answered by the Supreme Court of Montana in State ex rel Mallot v. Board of County Commissioners, 89, Mont. 37. In regard thereto, the Court said:

> "We are further satisfied that less injury will result from overruling rather than following the dictrine last announced and therefore the former holding of this Court that such bonds constitute general obligations is overruled." 89 Mont. at 95.

It must be conceded that state courts as well as other courts have a right to change their views; and the fact that the Supreme Court of Montana changed its view in regard to the interpretation of the irrigation district law presents no federal question in this case and does not justify the issuance of the Writ of Certiorari. Moore vs. Illinois Central Railway Co. 312 U. S. 631, 61 Sup. Ct. 754. Vander Bark vs. Owens-Illinois Glass Co. 311 U. S. 538, 61 Sup. Ct. 347.

IV.

The Circuit Court of Appeals properly reversed the judgment of the District Court for recovery of money against the Irrigation District.

The State court decisions definitely settled the law in Montana to the following effect:

> "The bonds are not an obligation of the District at all * * * The District in its capacity as a public corporation merely acts as the agency through which the assessments are levied and collected."
>
> State ex rel Malott v. Board of County Commissioners of Cascade County, 89 Mont. at 94-95, 296 Pac. at 18.

Under the rule of law above stated, there was nothing in the pleading or evidence in this case to justify the entry of a money judgment against the Irrigation District. The complaint merely alleges that the bonds were issued by the Irrigation District and were unpaid (R. 2119). This was admitted by the District's Answer. (R. 20-21). But since the bonds are not "an obligation of the District at all," the mere non-payment of the bonds does not justify the entry of a money judgment against the District.

There was no allegation in the pleadings and no proof in the record that the District had in any manner failed to perform its duties "as the agency through which the assessments are levied and collected." The bonds involved in this case are analagous to special improvement district bonds issued by municipalities; and mere non-payment of bonds does not justfy a money judgment against the municipality.

Gagnon v. Butte, 75 Mont. 279, 243 Pac. 1085.

V.

There is no basis for Petitioners' claim that the question here involved is Res Judicata.

In the Petition for Certiorari, petitioner makes the following statement:

> "In a previous case, brought by a stranger to the present proceeding, it was held that the very bonds here involved were general obligations, and that all the lands within the District were assessable until all the bonds were paid. Petitioners brought this action on said bonds as trustees; and one of the **cestuis** was an intervener in the previous case. Is it **res judicata** against the District that the bonds are general obligations?"

There is absolutely nothing in the record to justify this statement. No prior judgment of any character was ~~even~~ either pleaded or proved, or even referred to. It is impossible to understand upon what theory the suggestion is made or the question raised in the Petition for Certiorari. At any rate, the question finds no basis whatever in the record. The effect of a prior judgment is defined by the Montana statute as follows:

> "10558. **Effect of a judgment or final order upon rights in various cases.** The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:
>
> "1. In case of a judgment or order against a speci-

fic thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person."

"2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title, and in the same capacity, provided they have notice, actual or constructive of the pendency of the action or proceeding." R. C. M. 1935.

From a cursory reading of the statute, it appears that prior judgment is conclusive in the following cases only: (1) "when it is between the same parties, or their successors in interest, by title subsequent to the commencement of the action," and (2) when the question being litigated in the subsequent case is being "litigated for the same thing under the same title and in the same capacity," and (3) the judgment is conclusive then only "in respect to the matter directly adjudged" in the former action. Unless the pleading and proof show that all of these conditions exist, a plea of **res judicata** cannot be sustained. In the absence of any pleading or proof, as is the case here, (1) as to the former action; (2) the capacities in which the parties were litigating; (3) the issues involved in the case and the manner in which they were raised, and (4) the matters directly adjudged, neither this court nor the lower

court can even give consideration to the question of **res judicata.**

But in truth and in fact the case of Drake v. Schoregge reported in 85 Mont. 94, did not in any manner, or at all, involve the question of law which is involved in this case. That action was brought by the land owner, Drake, to restrain the County Treasurer from enforcing against his land the collection of a tax levied by the irrigation district. The ground upon which the action was based was the fact that a survey of the land and the proposed ditches to be constructed, showed that the lands owned by the plaintiff, Drake, in that case were not susceptible of irrigation. On that basis and on that basis alone, Drake sought to have the County Treasurer enjoined from collecting the tax. A general demurrer was filed to the complaint and sustained by the trial court. On appeal the Supreme Court held that the demurrer was properly sustained. No other question was involved.

So far as a right to injunction was concerned, it was wholly immaterial whether or not the bonds issued by the irrigation district created "a general indebtedness against the district" as had previously been held in Cosman vs. Chesnut Valley Irrigation District, 74 Mont. 111, or were not "an obligation of the district at all," as was subsequently held in State ex rel Malott v. Board of County Commissioners of Cascade County, 89 Mont. 37 at 94-95. That question was not in any manner involved. Neither the irrigation district nor the bondholders had been made parties to

the action as it was originally filed. They became parties only by intervention. When they became parties by intervention they were not adverse to each other and the nature of the obligation created by the issuance of the irrigation district bonds was not in any manner raised or decided, except to the extent as to whether or not the land of the plaintiff Drake, which was eventually found to be non-irrigable, was subject to the district assessment made in 1926.

It is true that the Justice of the Supreme Court writing the opinion in the case, referred to the previous decision in Cosman v. Chesnut Valley Irrigation District, 74 Mont. 111, and as part of his discussion of the question involved in Drake vs. Schoregge reiterated the view expressed in that case to the effect that "bonds issued create a general indebtedness against the district in the sense that all lands therein are taxable for the payment thereof, with interest, until the entire indebtedness is fully paid." 85 Mont. 104. But that question was not before the Court; it had no bearing upon the question that was actually before the Court and the mere mention of the matter decided in a former opinion was not in any sense an adjudication of a question which was not in issue between the parties to that suit, and which in fact have no bearing whatever upon the sole question involved in that case which was, whether lands eventually found non-irrigable were subject to the assessment made by the district in 1926. The validity of that assessment is not involved in this case in any manner.

The authorities cited on page 22 of Petitioners' brief do not support the view that it is unnecessary to **PROVE** the prior adjudication. Even if, in certain cases it is unnecessary to **PLEAD** the prior adjudication, it is still necessary to prove it. There is no authority to the contrary. In this case there was neither pleading nor PROOF of prior adjudication.

VI.

The alleged "plan" does not change the nature of the District's obligation as created by the original issue of the bonds.

In the Sixth paragraph of "Questions Presented" by the Petition for Certiorari, the Petitioners say:

> "Where, following a Supreme Court decision of the State holding the very bonds here involved to be general obligations, the appellee enters into a new written contract to pay the amount in full with interest and to levy taxes therefor, and there is no Montana decision holding such a contract void, does such a new promise sustain the judgment of the district court?"

The obviously correct answer to this question is the answer given by the decision of the Circuit Court of Appeals in this case.

> 'Appellees' final contention is that, if the bonds here involved were not general obligations of the district when issued, they became such by reason of an agreement which the district's officers made and executed in the name of the district on May 1, 1930. The con-

tention is rejected (1) because this action was not based on that agreement and (2) because that agreement, if and in so far as it purported to make the bonds general obligations of the district, was unauthorized and void. Laws of Montana, 1909, chapter 146, p. 38."

The section of the statute referred to by the Circuit Court of Appeals contains the following provision:

> "The Board of Commissioners or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, except as provided in this act."
>
> Section 7208 Revised Codes of Montana, 1921 and Section 7208 Revised Codes of Montana, 1935.

But even aside from the provisions of the statute above quoted, it is clear that if the bonds of the district are not "an obligation of the district at all" as held in State ex rel Malott v. Board of County Commissioners of Cascade County, 89 Mont. 37 at 94-95, and the district was without authority to pyramid assessments on the land owner who paid his pro rata share of the cost to cover the delinquency of land owners who did not pay as held in Rosebud Land & Improvement Co. v. Carterville Irrigation Co., 102 Mont. 465, then neither the district nor its commissioners could change the nature of the obligation created by the bonds, nor vest themselves with authority to levy against the land within the district assessments forbidden by law, by the mere device of entering into the alleged "Plan" referred to in the Petition for Certiorari. To hold otherwise would be to hold that public officers, whose authority is limited

by law, can increase their authority and broaden their powers by the mere device of entering into a contract to do so.

Furthermore, Respondent respectfully submits that the so-called plan (R. 65 to 73) was a mere device to defer the payment of the bonds. There is nothing in the plan to indicate any intention on the part of the district commissioners to change the liability of the district, or to undertake to make levies not authorized by law. On the contrary, the agreement specifically provides:

> "Sec. 2. The district agrees that it will comply with all of the provisions of the laws of the State of Montana relative to the levy and collection of such taxes." (R. 67).

One of the provisions of law which the Irrigation District thus agreed to comply with, was that assessments against the land within the district could not be pyramided upon the land which paid its pro rata share of the cost of the improvement to cover the delinquencies of the land which did not pay its assessments. Furthermore, the alleged "plan" was not pleaded in the District Court as the basis of recovery (R. 2 to 19), it is not referred to in the District Court's decision (R. 92 & 93) nor in the District Court's findings of fact and conclusions of law (R. 94 to 102) nor in the judgment of the District Court (R. 103-106).

CONCLUSION

Respondent respectfully submits that the Petition for Certiorari herein does not present a proper case for the issuance of the Writ of Certiorari under Rule 38 - 5 (b) of the rules of this Court. The decision of the Circuit Court of Appeals is in harmony with the applicable local decisions of the Supreme Court of Montana; and the only Federal question indicated has heretofore been decided in Erie Railroad v. Tompkins, supr, and the numerous cases following it, holding that the decisions of the Supreme Court of the State are controlling and conclusive upon all questions of local law, except in those cases controlled by the Federal constitution or acts of Congress.

Substantially the same questions involved in this case have heretofore been presented in Petitions for Certiorari filed in this court during the current term:

No. 287-8. Keefe v. Bloomfield Village Drainage District. A petition for Writ of Certiorari to review the decision of the Circuit Court of Appeals of the Sixth Circuit, reported in 119 Fed. (2) 157.

No. 504. Getz et al v. Town of Belleair. A Petition for Writ of Certiorari to review a decision of the Circuit Court of Appeals of the Fifth Circuit, reported in 120 Fed. (2) 494.

In each of the above cases the Writ of Certiorari was prayed for upon the ground that the latest decisions of the Supreme Court of the State overruled earlier decisions and thereby impaired the rights of bondholders, and that

the Circuit Court of Appeals had followed the latest decisions of the State Court.

In each of these cases the Writ of Certiorari was denied by this court during the current term.

> Getz v. Town of Belleair, 62 S. Ct. 125; Keefe v. Bloomfield Village Drainage District, 62, S. Ct. 95, 133, 910, 911.

Respondent respectfully submits that the application for Writ of Certiorari in this case should also be denied.

Respectfully submitted,

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